

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

GILBERT L. BRADSTREET,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DA-0752-97-0147-I-1

DATE: August 16, 1999

Charles H. Allenberg, Esquire, Neil C. Bonney & Associates, P.C., Virginia Beach, Virginia, for the appellant.

John W. Manion, New Orleans, Louisiana, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board on the agency's petition for review of the December 10, 1997, initial decision that mitigated the appellant's removal to a 90-day suspension. The appellant has filed a motion to dismiss the agency's petition, asserting that it has not complied with the initial decision's interim relief order. For the reasons set forth below, we GRANT the appellant's motion, and DISMISS the agency's petition for review.

BACKGROUND

¶2 Effective December 7, 1996, the agency removed the appellant from his position as a GS-5 Police Officer for having received a verified positive drug test result for cocaine. Initial Appeal File (IAF), Tab 5, Subtabs 4f, 4b, and 4a. On appeal, the appellant alleged that he was not guilty of the misconduct which formed the basis for the agency's charge, that the penalty was unreasonable, that, in taking the action, the agency committed harmful procedural error, and that the action was in reprisal for his protected whistleblowing activity and his having filed grievances and equal employment opportunity (EEO) complaints. *Id.* at Tabs 1 and 11. Following a hearing, the administrative judge issued an initial decision on December 10, 1997, in which she found the charge sustained, and rejected all of the appellant's affirmative defenses. *Id.* at Tab 25; Initial Decision (ID) at 2-12. She found, however, that removal was not a reasonable penalty, and she mitigated the removal to a 90-day suspension. *Id.* at 13-16. The administrative judge ordered the agency to provide interim relief, if a petition for review were filed. *Id.* at 17.

¶3 The agency filed a timely petition for review in which it argued that the administrative judge had erred in mitigating the penalty. Petition for Review File (PFRF), Tab 1. With regard to interim relief, the agency stated, and submitted evidence to show, that, by letter of December 22, 1997, it had ordered the appellant to return to duty on December 29, 1997, in the position of WG-2 Laborer. *Id.* at Enclosure 1. The agency advised the appellant that, in its view, the sustained charge indicated that he should not be trusted with police officer responsibilities, but it assured him that, notwithstanding, he would be paid the basic salary and locality pay of his original position. *Id.* The agency also submitted with its petition a copy of a December 31, 1997, letter to the appellant providing him with substantially similar information regarding his return to duty on interim relief. *Id.* at Enclosure 2.

¶4 The appellant then filed a motion to dismiss the agency's petition on the basis that its statement that it had complied with the administrative judge's interim relief order was insufficient proof that it had done so. *Id.* at Tab 3. The appellant also argued that he had not been returned to his former position as Police Officer or to one of comparable grade, scope, and status, that the agency had not made a proper showing that returning him to his position would have caused an undue disruption, and that it had not submitted documentation showing that it had initiated payment to him. The appellant submitted an affidavit in support of his position. *Id.*

¶5 Subsequently, the Board issued an order stating that the evidence submitted by the agency with its petition for review constituted an implicit determination on its part that returning the appellant to the workplace in his original position would cause an undue disruption, and that the Board may not look behind such a determination. *Id.* at Tab 4. However, the Board indicated that the appellant had raised a nonfrivolous issue of fact relating to the agency's compliance with the pay and benefits portion of its obligation. Accordingly, and consistent with 5 C.F.R. § 1201.115(b)(4), the Board ordered the agency to show why its petition for review should not be dismissed, that is, to submit evidence that it promptly paid the appellant appropriate pay, compensation, and benefits from the date of the initial decision. *Id.*

¶6 In its response,¹ the agency explained that it had made two attempts to place the appellant in an alternative position with pay retention to ensure payment at the full level of salary and benefits of his former position, effective the date of the initial decision, but that the appellant had refused to report for duty. *Id.* at Tab 5.

¹ The agency's initial response was to the appellant's motion to dismiss and not to the Board's Order, but in its subsequently timely-filed pleading, self-styled as a "supplement to petition for review" on the merits, the agency stated that its initial response had provided the evidence and argument ordered by the Board in its show-cause order. PFRF, Tab 7.

The agency indicated, and provided evidence to show, that the appellant had not only refused to report to the WG-2 Laborer position, but that he had failed as well to report to the position of Recreation Aide, GS-3, as he had subsequently been directed. *Id.* The agency further stated that the appellant would be provided payment for the period from December 10, 1997, to February 8, 1998,² "as soon as it can be processed by Defense Finance and Accounting Service," but that he would not be paid after that date due to his refusal to report for duty in the second assigned position *Id.*

¶7 In his timely-filed reply, the appellant stated that the agency had not, by the time it filed its petition for review, and still had not, some three months later, provided him any pay, compensation, or other benefits, as required by the administrative judge's interim relief order. *Id.* at Tab 9. The appellant submitted an affidavit in support of his position. *Id.* at Enclosure 1.

ANALYSIS

¶8 An employee who obtains relief in an initial Board decision "is entitled to the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review" 5 U.S.C. § 7701(b)(2)(A). An agency petition for review of an initial decision that ordered interim relief must be accompanied by evidence that the agency provided interim relief. *See* 5 C.F.R. § 1201.115(b). An agency complies with an interim relief order when it makes a determination that returning an employee to the position designated by the administrative judge would cause undue disruption and it provides the employee with the appropriate pay, compensation, and benefits of such designated position during the pendency of the petition for review. *White v. Department of the Air Force*, 71 M.S.P.R. 607, 611-12 (1996). Although the

² The appellant had been ordered by the agency on February 4, 1998, to report to the second of the two offered positions on Monday, February 9, 1998. PFRF, Tab 5, Enclosure 4.

agency is not required to have actually paid the appellant by the petition for review filing deadline, it must take appropriate administrative action by the deadline that will result in the issuance of a paycheck for the interim relief period. *Franklin v. Department of Justice*, 71 M.S.P.R. 583, 589-90 (1996). If the agency does not submit acceptable evidence that it has provided interim relief, the Board will dismiss its petition for review. 5 C.F.R. § 1201.115(b)(4).

¶9 The Board has held, however, that an agency's inadvertent delay in issuing pay under the interim relief order can be excused if promptly corrected, and does not show noncompliance with the interim relief order. *Woodford v. Department of the Army*, 75 M.S.P.R. 350, 355-56 (1997); *Franklin*, 71 M.S.P.R. at 590. Here, after the appellant had raised the issue of the sufficiency of the interim relief provided, the agency indicated that it had afforded the appellant payment of full salary from December 10, 1997, until February 8, 1998, but that it would not pay him as of February 9, 1998, due to his refusal to report for duty in the assigned position of Recreation Aide, GS-3. PFRF, Tab 6. Thus, as to the latter period, the agency indicated that its failure to pay the appellant was not only intentional but justified. We agree, and find that the agency properly refused to pay the appellant for the period of time following February 8, 1998.³ See *Rutberg v. Occupational Safety & Health Review Commission*, 78 M.S.P.R. 130, 135 (1998); see also *Rothwell v. U.S. Postal Service*, 68 M.S.P.R. 466, 468 (1995) (an interim relief order does not insulate an appellant from a subsequent agency action as long as that action is not inconsistent with the initial decision).

¶10 That does not end the inquiry, however, because, notwithstanding the appellant's refusals, the agency was still obligated to promptly provide him the pay, compensation, and benefits commensurate with his GS-5 position from

³ In fact, the agency could have refused to pay the appellant for the period of time following December 29, 1997, when he indicated that he would not report for duty to the WG-2 Laborer position.

December 10, 1997, the date of issuance of the initial decision, until at least December 29, 1997. *Rutberg*, 78 M.S.P.R. at 135.

¶11 We note that, in a pleading filed approximately eight months after the date of the initial decision, the agency finally submitted evidence that, on August 7, 1998, a check was issued in the amount of \$2,818.50, representing the appellant's pay for the period from December 10, 1997, the date of the initial decision, until February 9, 1998, the date of his second declination to report to work.⁴ *Id.* at Tab 11, Enclosure 9. The agency asserted that the delay in providing payment for interim relief was the result of the appellant's refusal to cooperate with the agency as well as problems in getting the payment issued by the Defense Finance and Accounting Service (DFAS). *Id.* at Tab 11. Specifically, the agency explained that the SF-50 placing the appellant as a Recreation Aide, and the SF-50 placing him on leave without pay effective February 9, 1998, were both approved on February 17, 1998, and the actions input into the Defense Civilian Personnel Data System that same day, at which time payment was to be initiated for the period of December 10, 1997, to February 8, 1998; that, because the appellant was not on duty during the period of interim relief, the command had no way of knowing whether he had been paid for this period without following up through the command comptroller with DFAS; that the command did not learn until May 1998 that payment had not been made by DFAS; that the comptroller tried unsuccessfully to have DFAS complete the payment but that DFAS required additional documentation; that pay action was completed during the pay period July 19-August 1, 1998, and a check issued on August 7, 1998, and placed in a safe in the comptroller's office by someone "unfamiliar with the case;" that the command contacted the appellant on August 18, 1998, and told him that the check

⁴ The pleading was filed in response to the appellant's March 10, 1998, letter again requesting dismissal of the agency's petition for review for failure to provide interim relief. IAF, Tab 10.

was available; and that he demanded a written explanation which the agency afforded him on September 2, 1998, "thus concluding payment for the period of interim relief for which he was entitled." *Id.*

¶12 Even if we were to consider the agency's latest submission which, as noted, was filed well after the time for responding to the interim relief issue had elapsed, PFRF, Tab 4, we would still not find that the agency had complied with the administrative judge's interim relief order. As noted, while an agency is not required to have actually paid the appellant by the petition for review filing deadline, it must take appropriate administrative action by the deadline that will result in the issuance of a paycheck for the interim relief period. *Franklin*, 71 M.S.P.R. at 589-90. Here, while the agency promptly advised the appellant by letter of December 22, 1997, that he would be returned to duty, although to a different position, PFRF, Tab 6, Enclosure 1, he was not issued a paycheck until August 1998. The appellant's failure to report for duty does not excuse the agency's significant delay in providing him the pay, compensation, and all other benefits to which he was entitled, from the date of the initial decision until at least such time as he indicated that he would not report for duty. *See Rutberg*, 78 M.S.P.R. at 135. Nor does any failure on the part of DFAS "to follow through" or its "extraordinary" processing requirements excuse the agency's substantial delay. PFRF, Tab 11; *see Moore v. U.S. Postal Service*, 78 M.S.P.R. 80, 85 (1998) (the agency's failure to pay the appellant any money for a period of four months was neither a minor matter nor excusable).

¶13 Accordingly, we find that the agency's failure to provide the appellant with this most fundamental element of interim relief, the resumption of his pay for the period from December 10, 1997, until at least December 29, 1997, for a period of eight months after issuance of the initial decision was neither excusable nor a minor mistake. As such, its petition for review must be dismissed. *Id.*

ORDER

¶14 The agency's petition for review is DISMISSED. The December 10, 1997, initial decision is now the final decision of the Board on the merits.⁵ This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

¶15 We ORDER the agency to cancel the appellant's removal effective December 7, 1996, and to substitute in its place a 90-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

¶16 We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

¶17 We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

⁵ In the initial decision, the administrative judge failed to afford the appellant mixed appeal rights, notwithstanding that one of his affirmative defenses was the claim that the agency's action was in reprisal for his having filed EEO complaints. The administrative judge erred in this regard, as such a claim affords an employee the additional statutory protection of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* *See Lewis v. Bureau of Engraving and Printing*, 26 M.S.P.R. 164, 167 (1985). The error, however, is cured by the provision of those rights in this Opinion and Order. *Haack v. U.S. Postal Service*, 68 M.S.P.R. 275, 283 (1995).

- ¶18 Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF SUSANNE T. MARSHALL, MEMBER

in

Gilbert Bradstreet v. Department of the Navy
DA-0752-97-0147-I-1

I disagree with the decision to dismiss the petition for review for failure to provide interim relief. To impose the sanction of dismissing the agency's petition for review is not appropriate under the circumstances where the agency completed all the administrative steps necessary to comply with the interim relief order. 5 C.F.R. § 1201.115(b)(1). I would grant the agency's petition for review and affirm the initial decision as modified, sustaining the agency's charge that the appellant tested positive for cocaine and sustaining the removal action.

With its petition for review the agency submitted copies of memoranda to the appellant notifying him that it would pay him the basic salary and pay of his original position even though he would be assigned elsewhere and would not be entrusted with police officer responsibilities. Petition for Review (PFR) File, Tab 1. In response to the appellant's motion to dismiss for failure to provide interim relief, the Board issued a show cause order to the agency. PFR File, Tab 4. The agency then submitted two standard forms, an SF-50 and an SF-52 indicating that it had requested a personnel action, effective 12/10/97, and one affidavit attesting to the appellant's failure to report to work as ordered on December 29, 1997. PFR File, Tabs 5 and 6. These submissions satisfied the requisite administrative steps to comply with an interim relief order, and the Board should have then proceeded to examine the merits of the agency's petition. 5 C.F.R. § 1201.115(b)(1). *See, e.g., Anderson v. Department of Transportation*, 59 M.S.P.R. 585, 590 (1993). An agency is not required to issue the appellant a paycheck for the period of interim relief as of the deadline for filing its petition for review. Rather, the agency by that date must take appropriate administrative

action that will result in a paycheck being issued. *See, e.g., Franklin v. Department of Justice*, 71 M.S.P.R. 583, 589 (1996).

In his responses to the agency's petition for review, the appellant asserted not only that the agency did not take appropriate administrative action, which is not true, but that he had not received any pay. PFR File, Tabs 3, 9, and 10. My colleagues have concluded that the agency's delay in paying the appellant was neither a minor matter nor excusable. They rely on *Moore v. United States Postal Service*, 78 M.S.P.R. 80 (1998), to support their conclusion that the petition for review must be dismissed because of the delay. In *Moore*, the Board found inexcusable the agency's failure to act for more than three months after the appellant notified the agency that he had not received any pay or compensation and that he believed it was not in compliance with the interim relief order. *Moore*, 78 M.S.P.R. at 85. Specifically, the Board concluded that its failure to take any action to provide its Finance/Payroll Office with the memorandum placing the appellant on administrative leave showed that the Postal Service, which had received clear notice, did not take appropriate administrative action that would result in the issuance of a paycheck to the appellant. *Id.*

Moore is distinguishable for several reasons. A significant factor in this case is that the agency, the Navy, must rely on the Defense Finance Accounting Service (DFAS), an agency within the Department of Defense which provides financial management for all agencies in DOD, to issue the payment for back pay. In many interim relief compliance cases, such as *Moore*, the agency alone is responsible for and processes back pay for its employees. The Navy, however, must rely on DFAS to pay its employees. The Board has recognized that a contributing factor to a delay in issuing a paycheck pursuant to interim relief resulted, and was excusable, when the agency did not handle payroll matters directly but relied on a separate agency for payroll services. *Buckler v. Federal*

Retirement Thrift Investment Board, 73 M.S.P.R. 476, 484 n.3 (1997). Such should be the case here.

Here, not only was the appellant not on duty during the interim relief period, he did not inform the agency that he had not been paid. Rather, as explained by the agency and not rebutted by the appellant, DFAS delayed processing the payment until it was satisfied that the payment was authorized. PFR File, Tab 11. As noted above, the record shows that the Navy took the appropriate administrative action to arrange for paying the appellant for the period from December 10, 1997, until February 8, 1998. PFR File, Tabs 1 and 5, Encl. 4, 6, 7, and 8. Because it had to rely on DFAS to process the appellant's pay, it also was reasonable for the Navy to proceed under the assumption that, by the time it had responded to the Board's order, it had completed all usual procedures necessary to insure that the appellant would be paid, had provided evidence of this to the Board, and could expect that the Board would examine the merits of the petition for review.

The Navy initially relied on its usual procedures in dealing with DFAS, assuming that DFAS had paid the appellant in accordance with the SF-52, or request for personnel action. When later aware of difficulties, it worked to insure that DFAS would process the pay. PFR File, Tabs 6 and 11. The Navy subsequently determined that, because of an apparent electronic communication failure between the Defense Civilian Personnel Data System and DFAS, the automated payment was not processed initially as expected. The Navy also learned that DFAS questioned the payment, which resulted in further delay, before DFAS finally issued a check for the amount the Navy had requested for the appellant. PFR File, Tab 11. The Navy provided reasonable explanations for the inadvertent delays in paying the appellant, and those delays do not show noncompliance under the circumstances. *See, e.g., Luciano v. Department of the Treasury*, 74 M.S.P.R. 441, 449-50, *aff'd* 152 F.3d 948 (Fed. Cir. 1998)(Table).

It also is undisputed that the agency has paid the appellant the full amount to which he was entitled. In fact, the agency has overcompensated the appellant by providing payment for the period December 29, 1997 (the date the appellant was ordered to but did not report to duty in a WG-2 Laborer position), through February 8, 1998 (when he refused to report to duty in the assigned position of GS-3 Recreation Aide). Note Majority Decision at paragraph 9. The sanction of dismissal of the petition for review is not warranted under these circumstances.

Sanctions are imposed to enforce compliance with the Board's orders. *See, e.g., Mavronikolas v. United States Postal Service*, 53 M.S.P.R. 113, *aff'd*, 979 F.2d 216 (Fed. Cir. 1992) (Table); *Collins v. United States Postal Service*, 66 M.S.P.R. 531, 534 (1995). Dismissal is a severe sanction, warranted where a party fails to exercise due diligence, exhibits negligence, or acts in bad faith. *See, e.g., Monley v. United States Postal Service*, 74 M.S.P.R. 27, 29 (1997). The record does not reveal evidence of negligence, bad faith, or lack of due diligence by the agency; and the sanction of dismissal therefore should not be imposed here. As in an enforcement proceeding where an agency is in compliance, sanctions are inappropriate at this time because the appellant has received his payment. *See, e.g., Mavronikolas*, 53 M.S.P.R. at 116; *Eikenberry v. Department of the Interior*, 39 M.S.P.R. 119, 121 (1988); *Suttles v. Office of Personnel Management*, 37 M.S.P.R. 282, 283 (1988).

Where the agency has shown that it followed usual procedures to ensure the proper payment, and where there is no longer any dispute about payment having been received, I believe that it is inappropriate to dismiss this appeal on a technicality. The agency's submissions satisfied the Board's regulatory requirements, and the Board therefore should have proceeded to adjudicate the merits of the agency's petition for review. Instead of reaching the merits of the appeal, however, the Board's examination was stalled on the issue of interim relief.

Interim relief is remedial in nature and designed in part to preclude economic hardship for the appellant during the period when the petition for review is pending. In this case, the appellant refused to accept positions offered by the agency. PFR File, Tab 5. Therefore, as the majority recognizes, he is not entitled to compensation for the time after he refused to work and did not provide any services to the agency. The payment at issue in this case covers the short time period between the date of the initial decision and the appellant's first refusal to return to the workplace on December 10, 1997 to December 29, 1997, for a total of 19 days. Under the interim relief provision, the appellant was entitled to payment even though he performed no work for the period, but the agency has reasonably explained that the delay in processing the pay was caused in part by the appellant's absence from the workplace. In addition, the Navy was unaware for a time that the appellant had not received payment, and there were subsequent delays at DFAS. These unintentional complications and consequent delays do not warrant sanctioning the agency in order to protect the appellant from economic hardship when the appellant voluntarily elected to forego the benefits of interim relief by refusing to report to duty. Here, the agency's submissions reveal that, for a number of reasons, any noncompliance was inadvertent and corrected when discovered. *See, e.g., Avant v. Department of the Navy*, 60 M.S.P.R. 467, 475 (1994).

In an enforcement decision issued within the past year, the Board excused an agency's delay in providing back pay where DFAS was responsible for issuing the check. *Kim v. Department of the Army*, MSPB Docket No. SE-0752-98-0038-X-1 (Dec. 11, 1998). In addition, as noted above, the Board's regulations only require the agency to take appropriate administrative action by the deadline for filing a petition for review. *Franklin*, 71 M.S.P.R. at 589. The Board has seen fit to excuse inadvertent delays in issuing pay due under an interim relief order, where an appellant has not shown that the agency had either intentionally delayed

payment or where the agency had promptly corrected a problem brought to its attention. *Id.* at 590. Not only has the appellant not shown that the delay in issuing the check was the result of an intentional action by the agency but the agency has detailed its efforts to insure that DFAS issued the payment.

Finally, I note that proceeding to examine the merits of this case after the agency filed its petition for review would not have deprived the appellant of his right to contest the agency's full compliance with the interim relief order. The appellant could challenge the sufficiency of the agency's compliance even after the Board issued a final decision on the merits. 5 C.F.R. § 1201.116(b).

Because I have found that the agency provided interim relief as ordered, I have examined the issue of whether the administrative judge correctly determined that the removal penalty was unreasonable and, if so, whether mitigation to a 90-day suspension was proper. I find that mitigation was unwarranted.

Although the administrative judge found that the appellant's explanation for testing positive for cocaine was suspect, she mitigated the penalty because she found that the deciding official failed to consider some important mitigating factors, such as the appellant's more than 20 years of service, the lack of a disciplinary record, and his good performance. She also found that testimony by other police officers contradicted the deciding official's belief that the appellant's co-workers would not accept his return. Initial Decision at 15-16.

My review of the hearing testimony by the deciding official indicates that, although he indicated that he mainly considered the agency's zero tolerance for drug usage for individuals in positions like the appellant's, he in fact, had been informed about the appellant's reliable work record over a number of years and had discussed this with the assistant security officer. Hearing Transcript (HT) at 117. The deciding official also considered the appellant's position as "an armed patrolman, policeman to a workforce" and the impact of that on his co-workers. HT at 118. Also, the official indicated that he had spoken to the labor relations

representative about the agency's policy in regard to civilian personnel who tested positive for drug urinalysis. HT at 119.

I find that, even considering his lengthy service record and lack of previous offenses, given the nature of the appellant's position as a Police Officer who carries an armed weapon, and in light of the lack of a credible explanation by the appellant for the positive Cocaine metabolites test result, the penalty of removal is justified, in consonance with the agency's zero tolerance policy, and not an abuse of discretion. *See, e.g., Jones v. Department of the Navy*, 67 M.S.P.R. 6, 9 (1995). I note that the Board has sustained the removal penalty for a crane operator who tested positive for cocaine use, in part because of the agency's loss of confidence in the individual's ability to safely perform his duties, but primarily because of the seriousness of the misconduct and its relationship to the position he held. *Brown v. Department of the Navy*, 65 M.S.P.R. 245, 253 (1994). Similar factors were considerations in this case, too. The Board has found mitigation not appropriate and has sustained a removal when an administrative judge improperly minimized the agency's concern regarding the consequences of the appellant's drug usage on his work. *Thomas v. Department of the Air Force*, 67 M.S.P.R. 79, 83 (1995).

In view of the nature and seriousness of the charge in this case, especially when considered in the context of the appellant's position as a law enforcement officer, removal is not unreasonable. The Board has often noted that law enforcement officials are held to a higher standard of conduct than other employees. *See, e.g., Fischer v. Department of the Treasury*, 69 M.S.P.R. 614, 619 (1996).

For the above reasons, I respectfully dissent.

Susanne T. Marshall

Member